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Memo to Robt. Anstruther

January 23. 1771.

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Chas Inglis

[LORD KENNET Reporter.]

INFORMATION

FOR

SIR ROBERT ANSTRUTHER of Balcaskie, Bart. one of the principal Clerks of the Bills; and for the Representatives of DAVID ANSTRUTHER, formerly another principal Clerk thereof, Defenders,

A G A I N S T

CHARLES INGLIS Depute Clerk of the Bills, Pursuer.

UPON the 26th day of January 1747, Charles Inglis, present depute-clerk of the bills, obtained from the now deceased Sir Philip Anstruther of Balcaskie, Bart. and David Anstruther then conjunct principal clerks to the bills, a commission proceeding upon the narrative " That they had formerly granted a commission, " bearing date the 2d and 4th days of June 1742, to Charles Inglis " elder, and Charles Inglis younger, his son, during their joint " lifetimes, and to the longest liver of them two, to be their de- " pute-clerks to the bills of suspension and advocacy, receiving of

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" bonds

“ bonds of cautionry relative thereto; and other things more par-
 “ ticularly expressed in that commission : As also that they had, of
 “ the same date, obliged themselves, in case the said Charles Inglis
 “ elder should depart this life before the said Charles Inglis young-
 “ er, his son, during the joint lifetimes of them, the said Sir Philip
 “ and David Anstruthers, in that event, to grant a new commission in
 “ favours of the said Charles Inglis younger, to be their depute-
 “ clerk, and that during all the days of his natural life ; and upon
 “ the subsumption that the said Charles Inglis elder had then de-
 “ parted this life before his said son, that the said Charles Inglis
 “ younger had not only then, in virtue of the foresaid joint com-
 “ mission, the possession of the said office of depute-clerkship, as
 “ having survived his father, but had also desired them to grant a
 “ new commission to him of that office, in terms of their obligation,
 “ and therefore the saids Sir Philip and David Anstruthers consti-
 “ tuted and ordained the said Charles Inglis younger, during all
 “ the days of his natural life, to be their depute-clerk for officiating
 “ under them and their successors in office, in all bills of suspen-
 “ sions and advocations to be given in at their office, and presented
 “ before the Lords of Session, and to receive the bonds of cautionry,
 “ and uplift the ordinary dues of the said bonds of cautionry, and
 “ to apply the same to his own use; and generally to act and do un-
 “ der them, and their successors in the said office of depute-clerk-
 “ ship, in all and every thing as fully and freely as the said Charles
 “ Inglis elder, his father, or any other former deputies were in use
 “ to do ; and that that commission they declared was to stand good
 “ and effectual to the said Charles Inglis, during all the days of
 “ his natural life ; to which they obliged them, jointly and several-
 “ ly, and their heirs and successors.”

Upon the 6th day of March, 1764, Robert Waddel, then, and
 now, one of the principal clerks of the bills, for himself, and in
 name of Sir Robert Anstruther, the other principal clerk of the bills,
 intimated to the said Charles Inglis, “ That, in terms of their com-
 “ missions from the crown, he, the said Robert Waddel, was to
 “ attend personally himself, and do the business in the bill cham-
 “ ber, to receive, present, and read to the Lords all bills of suspen-
 “ sion, advocacy, and other papers given in to the office ; and
 “ transact and do every thing relative thereto, except what, as men-
 “ tioned in that intimation, was to be committed to the care of the
 “ said

“ said Charles Inglis : That he proposed to remove the office out
 “ of the said Charles Inglis’s house against the term of Whitsunday
 “ then next, when he proposed to begin to officiate : That from
 “ thence forward, the said Charles Inglis was not to mark the date
 “ of presenting, or sign any bills of suspension or advocation, or
 “ sign the common bills, or any other papers whatever, that might
 “ be given into, or taken out of the office, except in case of the ab-
 “ sence of him the said Robert Waddel, and the said Sir Robert An-
 “ struther : That he was to uplift from the said Charles Inglis, and
 “ take into his own custody all the papers he should have at the
 “ time foresaid, relative to the office, and to take up from him what
 “ consigned money should then be in his hands : That he was also
 “ to draw, and receive the fees paid at the office for the different
 “ branches of business ; and, in that view, required the said Charles
 “ Inglis to have full inventories made up of all the papers then in
 “ the office, and the registers of the bonds of cautionry filled up,
 “ and these, together with the bonds themselves, and all the minute-
 “ books wherein consigned money is marked and set down, and
 “ consigned money itself, ready to deliver and give up to him a-
 “ gainst the afore-mentioned time ; and, in general, that he should
 “ deliver up all the receipt-books, minute-books, or other books,
 “ records, and papers, in his custody and keeping, relative to the
 “ said office.” Upon which intimation Mr Waddel took a protest
 in the hands of a notary.

Upon the 26th of May thereafter, Mr Waddel required Mr Inglis,
 likewise under form of instrument, to “ allow him to remove the
 “ office for keeping the records and other writings belonging to
 “ the clerks of the bills, to a shop in the New-Exchange ; a place
 “ he had taken for it, and to deliver up the whole records and
 “ other writings belonging to that office ; and to cease from acting
 “ therein, further than agreeable to the first intimation above-
 “ mentioned.”

Upon the 16th of June 1764, the said Sir Robert Anstruther
 and Robert Waddel offered a petition to the Court of Session,
 wherein they recite the two above-mentioned protests, and pray
 for the reasons therein mentioned, “ That it might be found, that
 “ they, as principal clerks to the bills, were intitled to discharge
 “ the duties of that office personally by themselves ; and that the
 “ said Charles Inglis, as depute clerk, was only intitled to be as-
 “ sistant

“ sistant to, and subservient to them in such branches of the business of
 “ that office, as they should please to commit to him, excepting in
 “ the case of their absence; and, as a consequence of the premises,
 “ that they were intitled to take into their own custody and keep-
 “ ing, in the office prepared for that purpose, the whole books,
 “ records, and other writings, bonds of cautionry, consigned
 “ money, and others belonging to the said office; and therefore,
 “ that the said Charles Inglis might be ordained to deliver up
 “ these to them.” Upon advising of which petition, with the
 answers thereto, the Lords, upon the 24th of July 1764, “ Found
 “ the petition not competent, and therefore dismissed the same,
 “ reserving to the petitioners, to insist against the respondent
 “ in a declarator or reduction; and reserving to the respondent
 “ his defences against the same as accords.”

Thereafter the said Robert Waddel having brought an action
 against the said Charles Inglis, libelling upon his commission from
 the crown, dated the 21st of May 1762, whereby he and the said
 Sir Robert Anstruther were appointed conjunct principal clerks
 to the bills, during all the days of their lives, with power to exerce
 that office, either by themselves or their deputes, for whom
 they should be answerable, calling for exhibition of the deputation
 granted to the said Charles Inglis; and concluding for the
 reasons mentioned in the libel; particularly, that that commission
 of deputation could not subsist after the death of the granters
 thereof, “ That the same should be reduced: And likewise con-
 “ cluding, that it ought to be found and declared, that the pursuer
 “ had, in virtue of his commission from the crown, notwithstanding
 “ ing of that deputation in favours of the said Charles Inglis, a
 “ right to officiate in every branch of the business of the bill-
 “ chamber, in the same manner as if such deputation had never
 “ been granted; and that, on his so officiating, he was intitled to
 “ have the custody and keeping of all the records, and other
 “ writings relative to that office, and to have the keeping of the
 “ office himself, in conjunction with the other principal clerk,
 “ who only ought to be intitled to sign extracts, certify writs,
 “ bills, interlocutors, &c. which the defender ought not only to
 “ be debarred from doing, but also should only be found to be
 “ assistant and subservient to the pursuer in such branches of the
 “ business of the office, as his deputation bore, or the pursuer
 “ should

“ should commit to him, and to such fees as were thereby grant-
 “ ed to him; and that he was bound to make up full registers
 “ of the bonds of cautionry since the date of his commission,
 “ and to bring the same forward during his incumbency.” In the
 course of which process, wherein the said Sir Robert Anstruther
 appeared and declared, “ That he concurred with the defender in
 “ support of his deputation, and in opposing the pursuer’s at-
 “ tempt for reducing the same, or making any encroachments
 “ thereon.” After a variety of procedure, both with regard to the
 reduction of that deputation, and with regard to the declara-
 tory conclusions of the libel, the Lords, upon the 9th of
 August 1768, “ Sustained the defences made for the said Charles
 “ Inglis, repelled the pursuer’s reasons of reduction, assolizied the
 “ defender from the whole points and conclusions of that libel;
 “ and decerned him free therefrom in all time coming.” A-
 gainst which judgment the pursuer having appealed to the House
 of Lords. It was ordered and adjudged, on the 14th of February
 last, by their Lordships, “ That his petition and appeal be dis-
 “ missed, and that the interlocutors therein complained of be af-
 “ firmed; and it was further ordered, that the appellant pay to
 “ the respondent the sum of L. 100 Sterling for his costs in re-
 “ spect of the said appeal.”

While this question depended before the Court of Session, Mr
 Inglis brought an action against the said Sir Robert Anstruther,
 as representing Sir Philip Anstruther his father, and against the
 representatives of the said David Anstruther, libelling “ Upon his
 “ commission from the said Sir Philip and David Anstruthers in
 “ the year 1747: That the said Robert Waddel had brought the
 “ above-mentioned action of reduction and declarator against
 “ him, the tendency whereof was, to set aside the commission of
 “ deputation granted to him, which the said Sir Philip and David
 “ Anstruthers stood bound to warrant; and therefore concluding,
 “ that the defender should be decerned to defend him against
 “ that action, and to pay him all the damages he had incurred,
 “ or might have incurred through the same; and in case the said
 “ Robert Waddel should prevail, to pay him a just equivalent for
 “ the value of that office, or such part thereof as should be evicted
 “ from him.” Which action he having insisted in before the
 Lord Kennet Ordinary in the cause, upon the 6th of July last,
 his Lordship, after hearing the parties and ordaining them to

state their respective allegations in memorials, upon advising these memorials, which were given in, in obedience to that appointment, on the 27th of November last, pronounced the following interlocutor upon the memorial for the pursuer: "The Lord Ordinary having considered this memorial for the pursuer, with the memorial for the defenders, in respect that the petition at the instance of the defender Sir Robert Anstruther and Robert Waddel, against the pursuer, did not pray to have it found, that the deputation to him was void, or at an end; but only that, notwithstanding thereof, the principal clerks of the bills were intitled to officiate themselves, and to have the keeping of the records and consigned money; and did not crave, that any part of the dues given to the pursuer by the commission of deputation should be taken from him; and that the pursuer was assoltized from the action of reduction of his commission of deputation, brought at the instance of Robert Waddel against him: Finds, that the defenders are not liable, upon the warrandice contained in the pursuer's commission of deputation, to pay to the pursuer the expences laid out by him in defending against these processes; and therefore assoltizes the defenders, and decerns."

Of this judgment the pursuer having complained to the Lord Ordinary by a representation, his Lordship, on the 20th of December last, after answers were made to that representation, "made *avisandum* with the process to the whole Lords; and appointed the parties to lodge their informations in the Lords boxes against the 17th day of January then next." In obedience whereto, what follows is humbly submitted to your Lordships consideration, on the part of the defenders, after making this preliminary observation, That the present question does not seem to concern any other expences than what regarded the process of reduction of Mr Inglis's commission before the Court of Session. Whatever he may have laid out in answering the petition, which was found incompetent, or whatever he may have laid out in defending himself against the declaratory conclusions of Mr Waddel's libel; these seem to have no connection with the present question; because, supposing the prayer of that petition to have been granted, or Mr Waddel to have prevailed in the declaratory conclusions of his libel, the warrandice would
not

not have been incurred; neither can the expences of the appeal come at all under consideration, there having been already L. 100 adjudged in name of these by the House of Lords.

The grounds, then, whereupon the defenders insisted before the Lord Ordinary, that no action lay against them at the pursuer's instance, for the expences that he had been put to in defending himself against the attack made upon him by Mr Waddel, and which they now humbly submit to the consideration of the Court, were these:

1st, That they humbly apprehend, that even supposing the pursuer's commission to have been set aside, the words of the warrandice therein contained could not import an obligation to warrant the same absolutely. The words of the obligation whereupon the pursuer founds his demand are, as above recited, "That the commission granted to him was to stand good and be effectual to him, during all the days of his natural life, to which the granters obliged themselves." These are very different from the usual stile of a clause of absolute warrandice, whereby the right is warranted from all dangers and perils whatsoever at all hands, and against all deadly; and here it is thought may be very naturally constructed to mean no more than *warrandice from fact and deed*; but not warrandice from any defect of power to grant that commission, especially when it is attended to, that it is believed the pursuer will candidly admit, that when his father obtained the commission of depute-clerk of the bills, which was in the year 1713, he paid no less a sum for it than 20,000 merks, without any such clause of warrandice as that contained in the pursuer's own commission; whereas when the pursuer himself obtained his first commission in the year 1742, (which commission the defenders have not seen, and which, for what they know, bore no warrandice,) he only paid L. 500 Sterling; and that in the year 1747, four years after his father's death, he obtained a renewal of that commission, containing the above-mentioned clause of warrandice, without any further consideration.

But, 2^{dly}, Be that as it will, what the defenders have chiefly insisted on is, that in this case, Mr Inglis the pursuer's commission of deputation having been found good, both by the Court of Session

Session and the House of Lords, so that no eviction has followed upon the challenge thereof by Mr Waddel, there lyes no action against the defenders to reimburse the pursuer of the expences that challenge has brought him to, and that for the following reasons :

1st, That by the exprefs words of the commission, whereupon the present action is founded, the granters of that commission were only bound, that the same should stand good and effectual to the pursuer during all the days of his natural life : And it has been found, both by the judgment of the Court of Session, and that of the House of Lords, that the pursuer's commission must stand good, and be effectual to him during his lifetime ; so that it is plain, there is nothing in the words of that obligation whereupon the present action can be supported.

2^{dly}, When the nature of the thing is attended to, the defenders humbly apprehend, that there is as little ground to conclude from thence, that there is any foundation for the present action. When one person conveys a subject to another for an onerous cause, which subject he is obliged to warrant, the nature of that warrantice only is *ut emptori liceat rem habere*. This is the language of the law, according to the *L. 57. de evictionibus*. And in the present case, the pursuer continues in the possession of his office ; and by that means *rem habet*. And indeed it seems to be highly absurd, that any person should be obliged to warrant against a groundless challenge of a right granted by him brought by a third party ; *Qua enim cura aut diligentia consequi possimus ne aliquis damnum nobis injuria det ?* as is expressed in the *L. 19. commodati*, and the *L. 41. locati*. And in this case, it must be held, that the challenge of the pursuer's commission was groundless and vexatious, the House of Lords having found him intitled to L. 100 of costs, in respect of the appeal. How far he may be itill intitled to recover his other expences from Mr Waddel, the defenders will not take upon them to say ; but this they apprehend they may with some confidence affirm, that, if the case had appeared equally clear to the Court of Session that it did to the House of Lords, expences would have been likewise adjudged to him there : And as, after the judgment of the House of Lords, the process brought by Mr Waddel must be held to have been to all intents and purposes groundless and vexatious, it appears to be

be by no means reasonable, even though the pursuer should not now be found intitled to recover the expences of that process from Mr Waddel, that the defender should be loaded therewith.

3dly, According to many texts in the civil law, which, it is believed, in a case of this kind, will be much regarded, the pursuer's present demand seems to be altogether groundless. The very name of an action of warrandice is, in that law, called an action of eviction, which supposes that an eviction must happen before such action arises; and upon this occasion the defenders beg leave to quote two of these texts, one l. 102. *De Verborum Obligationibus*; the words whereof are: "Venditores emptori
" caverant pro evictione quanti ejus interesset; [sed et] speciali-
" ter adgnituros, si in lite mota sumptus fecisset, emptori stipu-
" lanti promiserant: Post mortem emptoris, unus ex venditori-
" bus ad judicium vocavit, pretium sibi deberi dicens: Heredes
" ejus, qui sumptus in defensione causæ factos, cum probarent
" pretium solutum fuisse ex stipulatione petebant. Modestinus
" respondit, si [in] eas impensas venditores promiserunt, quæ ob
" litem de proprietate institutam factæ essent; minime ex stipu-
" latu peti posse, quod erogatum est; dum alter ex venditoribus
" pretium quod jam fuerat exsolutum petit." And the other l. 18. c. *De evictionibus*, which is a rescript of the Emperors Dioclesian and Maximian, and is in the following words: "Si status
" tibi super homine venundato, mota quaestio est solennibus, quæ
" juris admittit ratio interpositis: Si secundum libertatem fuerit
" lata sententia poteris de evictione (ejus quem comparaveras;)
" si nesciens ejus conditionem comparasti, sine aliqua dubitatione
" auctorem, vel ejus fidejussores, heredesve eorum, convenire.
" Quod, si fuisse servum sententia declaraverit, intelligis ad ven-
" ditorem te reverti non posse." In the first of these texts a case is put, where an express stipulation had intervened betwixt the buyer and seller, that the seller should pay the expences of any suit that should be brought to evict the subject sold, which appears plainly to have been the only reason of doubt, because otherwise the case felt to have been stated in general without mentioning such stipulation; and, as it is expressly answered, that, even in that case, no expence was due, it seems clearly to have been understood, that where no such stipulation had intervened, there

arose no action for expences, even where the question concerned the subject sold ; and as in the case of the other law, where the person sold was found to be a slave, there could be no question but about the expence of the suit, it is plainly there determined that no claim lay for such expences. To these authorities from the law itself the defenders beg leave to add the opinions of two commentators of very great repute, namely of Cujacius and Voet : The first in his explanation of the above recited l. 102. *De verborum obligationibus*, and the other in his Commentary on the pandects, tit. *De Evictionibus*, § 25th.

And 4thly, This appears plainly to have been likewise the opinion of the lawyers of this country. The Lord Stair, at the foot of page 223 of his Institutions, edit. 1693, expressly says, " The effect of warrandice is the up-making of what is warrant-
" ed, in so far as it is evicted, &c. and if eviction follow, and
" distress thereby, declarator of distress and action of warrandice
" for relief is competent." And the Lord Bankton is still more explicit upon this point : His words are, p. 578. vol. I. speaking of a person against whom an action is brought to evict a subject which his author stands bound to warrant : " If he prevail in
" the action, he has no claim against the author or warrantor for
" the expence in the defence, unless it is expressly so covenanted,
" for otherways it is an accident which a purchaser must submit
" to, the warrandice in such case not being incurred."

It was argued for the pursuer, " 1st, That it would be ex-
" tremely hard if he could not recover the expences he had ne-
" cessarily laid out, in protecting his commission of deputation
" from the challenge brought against it by Mr Waddel, consider-
" ing the high price he paid for that commission ; and that it
" appeared to the Court of Session to be a very doubtful point,
" whether the same should continue in force after the death of
" the granters or not, however the matter might have stood if
" the challenge thereof had been clearly groundless. 2^{dly}, That
" after the pursuer had brought the present process against the
" defenders, it was their business and not his to support the va-
" lidity of that commission, according to the l. 74. § 2. *De evic-
" tionibus mora questione interim non ad pretium restituendum
" sed ad rem defendendam venditor conveniri potest.* He might
" have lien by, and whether the defenders had appeared or not, if
his

“ his commission had been set aside, they would have been liable
 “ upon their predecessor's obligation to have made good the da-
 “ mage thence arising to him. 3dly, That the pursuer, by un-
 “ dertaking the defence of his commission *utiliter negotium gessit* of
 “ the defenders ; and therefore the expence laid out by him in
 “ support thereof, was *in rem versum* of them, for recovery where-
 “ of he must now have an action, as if they had undertaken that
 “ defence themselves, though they had prevailed therein, they
 “ would have had no action against him for recovery of such ex-
 “ pence. And 4thly, That judgment falls to be pronounced a-
 “ gainst the defender Sir Robert Anstruther upon this separate
 “ ground, that he counteracted his father's obligation by con-
 “ curring with Mr Waddel in the above mentioned protests taken
 “ by him against the pursuer, and summary application to the
 “ Court of Session, which gave rise to the after process of reduci-
 “ tion and declarator ; the object of that summary application, as
 “ well as of the process of reduction and declarator, being to
 “ deprive the pursuer of part of the emoluments of the office
 “ that his predecessor stood bound to warrant ; and in the pro-
 “ ceedings upon that summary application, it having been ar-
 “ gued for him, that the commission of the depute clerk could
 “ not subsist after the death of the principal clerks who granted
 “ the same.”

To the first of which arguments it was answered for the defen-
 ders in point of law, That the pursuer can complain of no hardship
 in not being allowed these expences from the defenders, if the
 law be as they have endeavoured to maintain, that even upon
 absolute warrantice no action lies against the warrantor for reco-
 very of any expences that may be debursed in defending against
 a suit brought by a third party against the person warranted, in
 which suit that person prevails ; and that in general, whether
 such suit be found vexatious or not, but more especially where it
 is found to be of that nature, as in this case it must be held to
 have been. The expences of the appeal against the pursuer have
 been decreed to him, which necessarily supposes the challenge of
 his commission to have been groundless ; after that decree he must
 in law be esteemed to have been equally entitled to his other ex-
 pences against Mr Waddel ; and whatever obstacle may now stand
 in his way against his recovering these expences from him, whe-
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ther that obstacle shall be understood to arise from the pursuer's not making a demand of his expences, when the judgment was pronounced by the Court of Session in his favours, or from his not causing a motion be made in the House of Lords, when that judgment was affirmed, that either the cause might be remitted to the Court of Session with an instruction to give expences, or that it might be reserved to him to insist in a proper process for these expences, or from whatever other cause the pursuer may now be cut off from any such claim, it seems to the defenders to be extremely hard, if they should be any manner of way affected thereby.

And in point of fact, it is answered, that as the 20,000 merks which it is believed the pursuer's father paid for his first commission to this office, cannot now come under consideration, he having enjoyed that office to his death in the year 1743: The L. 500 afterwards paid for the renewal of that office, in name of both father and son, must be looked upon as a very small price considering the settlements thereof, which the pursuer has now enjoyed since his father's death in the year 1743, and which it is hoped he will still long enjoy; so that there appears to have been a very beneficial bargain made for him, when that L. 500 was paid, although the expences now claimed by the pursuer should be repaid by himself.

To the second of the above-mentioned arguments it was answered, That the defenders deny that upon the present process being brought by the pursuer, there lay any necessity upon them to have taken upon themselves the support of the validity of his commission, and that he himself might have lain by. They own they were bound to furnish him with all materials proper to be insisted on by him in his defence, so that if the subject had been evicted through the omission of any defence which they were, faulty in not furnishing him with, an action upon the eviction would have lain against them. But further, they were not bound, and the pursuer does not complain that there was any defect upon the defender's part that way. And they take l. 74. §. 2. *de Evictionibus*, quoted for the pursuer, to import no more than that the person bound in *warrantie*, when a challenge of the right warranted is brought, is obliged to supply the principal defender with proper defences, but not that he is bound to consider himself as the sole defender,

defender, and to take the support of the right upon himself alone ; that law says no such thing, and that it is not the meaning thereof, is the express opinion of Voet in the above cited §. 15. *de Evictionibus*. If the defender had lain entirely by, and allowed the subject to be evicted, undoubtedly the words of the l. 55. *de Evictionibus*, would have applied to him : “ Si ideo emptorem
 “ judicatum est quod deficit, non committitur stipulatio magis,
 “ enim propter absentiam victus videtur, quam quod malam
 “ causam habuit.”

To what was insisted upon in the third place by the pursuer, it was answered, that the defenders apprehend, that though they had taken upon themselves alone to support the validity of his commission, if they had therein prevailed, they would have had a good action against him for recovering the expences laid out by them, because truly that was chiefly the negotium of the pursuer, and not theirs. But this they apprehend to be beyond all question, that if they had undertaken that defence under protest that the pursuer should indemnify them of their expences, in case they prevailed, an action at their instance would have properly lain against him for the recovery of these expences ; and it appears to them, as the case happened, that they can be in no worse situation with regard to these expences, than if they had disbursed the same themselves under such protest. That the defenders admit that the pursuer *utiliter negotium gessit*, but at the same time it is true, that *negotium suum gessit*, and not that of the defenders, whatever consequential advantage arose therefrom to them ; and in such a case they take it to be an established point in law, that no *actio negotiorum gestorum* lies even upon the ground of *in rem versum*.

And to what was in the last place insisted on for the pursuer, it was answered, That upon considering the terms in which the pursuer's commission of deputation libelled on was granted, the above-mentioned protests taken by the said Sir Robert Anstruther and Mr Waddel, and the prayer of their petition, Sir Robert can in no degree be considered to have counter-acted the obligation of warrandice incumbent upon him as representing his father Sir Philip. That commission was granted upon the narrative of the former commission, in the year 1742, and that the granters had then become bound in the event of Charles Inglis elder, dying

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before his son, to grant a new commission to the son ; and therefore the said Sir Philip and David Anstruthers, “ constituted the
 “ pursuer during all the days of his natural life, to be their *depute*
 “ clerk for officiating *under* them and their successors in office,
 “ in all bills of suspension to be given in at their office, and to
 “ receive the bonds of cautionry, and uplift the ordinary dues
 “ thereof, and to apply the same to his own use, and generally
 “ to act and do *under* them and their successors in said office of
 “ *depute* clerkship, in all and every thing, as fully and freely as
 “ the said Charles Inglis his father or any other former *deputies*
 “ were in use to do.” According to the above-mentioned protests
 all that was intimated to Mr Inglis was, “ That Mr Waddel was
 “ to attend himself and do the business of the bill chamber: That
 “ he proposed to remove the office: That Mr Inglis was only to
 “ act in his absence ; and that he proposed to take into his own
 “ possession the several writings relative to that office.” And the
 prayer of the petition is only to find, “ That the principal clerks
 “ of the bills were intitled to discharge the duties of that office
 “ by themselves, and that the pursuer as *depute*-clerk, was only
 “ intitled to be assistant to them in such branches of the business
 “ as they should please to commit to him, excepting in the case
 “ of their absence ; and therefore, that they were intitled to take
 “ into their custody whatever belonged to the said office ;” where-
 by it does not appear to the defenders that the obligation of war-
 randice incumbent on them was in the least counter-acted. The
 pursuer, by his commission, was only created their *depute*-clerk,
 with power to act *under* them : This right was by no means en-
 croached upon by their acting themselves, since it can never be
 understood to be the nature of a deputation to deprive the princi-
 pal from acting by himself, when he has a mind, however the de-
 pute may thereby be deprived of some emoluments ; such emolu-
 ments must in the nature of the thing, as they arise from the non-
 attendance of the principal, depend entirely upon his pleasure,
 as it would be highly absurd to put such a construction upon a
 commission of deputation, or upon an obligation to warrant such
 a commission as that the principal could not act himself, but be-
 hoved to absent himself from the business of his office that great-
 er emoluments might thereby arise to his *depute* ; no other emo-
 luments could be understood to be contained in the pursuer’s
 commission,

commission, and thereby warranted to him, but such as belonged to him in the character of depute, that is, what he would be intitled to whether the principals acted by themselves or not; and to encroach upon such emoluments, it is plain, was not the view of these protests and petition; so that it does not occur to the defenders that there is the least inconsistency betwixt these steps taken by Sir Robert Anstruther, one of them, and the obligation incumbent upon him to warrant the pursuer's commission; neither do the defenders perceive that it can have an influence upon the present question, that in the course of the proceedings upon the petition, which had quite another tendency than that of removing the pursuer from his office of depute-clerk of the bills, it was hinted as a doubt How far his deputation could subsist after the death of the principal clerks who granted the same? as that doubt must naturally have occurred to Mr Waddel alone, though Sir Robert Anstruther has never concurred with him; and as at the same time that that doubt was mentioned, it was declared the petitioners did not thereby mean to challenge the pursuer's commission.

In respect whereof, &c.

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commission, and thereby warranted to him, but such as belonged
 to him in the character of deputy, that is, what he would be in-
 titled to whilst he was employed by the society or not; and in
 general, upon each commission, it is plain, was not the view of
 third parties and parties; so that it does not occur to the ex-
 tent that there is the full inadequacy between the latter as-
 sen by Sir Robert Anstruther, one of them, and the other as-
 signment upon him to warrant the partner's commission; nei-
 ther do the defendants perceive that it can have an influence up-
 on the present question, that in the course of the proceedings up-
 on the petition, which had gone another tendency, in the
 removing the partner from his office of deputy clerk of the court,
 it was shewn as a double blow in his deposition could the effect
 the death of the principal clerk who granted the warrant, as that
 double death naturally have occurred with him; and as Sir
 Robert Anstruther has never concurred with him; and as at
 the same time that doubt was mentioned, it was declared that
 the petitioners did not thereby mean to challenge the partner's com-